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No. 94-1053

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BARRY WILLIAM LEVINE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

1. Respondent spends the majority of its Opposition Brief quoting from the factual recitations contained in the opinions below, in an apparent effort to demonstrate that Petitioner behaved improperly during his representation of his client at trial, and therefore deserved to be held in contempt. Needless to say, Petitioner is prepared to prove that, to the contrary, he never intentionally violated a single court order, but instead always strove to adhere to the court's rulings—while at the same time also upholding his duty to represent zealously the interests of his client. The important issue here, however, is that Petitioner has been totally precluded from proving this very point, due to the fact that he has been denied a hearing, before an impartial judge, with respect to any of the charges against him. As a result of this constitutional

deprivation, there can be little confidence in the accuracy of the factual matters asserted in the lower court opinions, and thus Respondent's reliance on them is misplaced.

2. Plainly, the court of appeals did not determine whether there was an actual obstruction of justice in this case—a prerequisite to the use of the summary contempt power under this Court's precedents. Respondent suggests that this Court should not review the propriety of the court of appeals' refusal to make this determination, on the grounds that the court of appeals made a similar omission in *In re Holloway*, 995 F.2d 1080 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1537 (1994), and this Court declined to review the *Holloway* decision. This contention is without merit. Respondent cannot argue that the denial of the petition in *Holloway* implies this Court's approval of the court of appeals' decision in that case, in light of the long-standing principle that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). To the contrary, the fact that this Court was called upon to address a similar question recently in *Holloway* demonstrates the recurrent nature of this issue, and militates in favor of the Court taking the opportunity to speak to this question.

Moreover, *subsequent* to the denial of certiorari in *Holloway*, this Court issued a decision emphasizing the importance of the requirement that the summary contempt power be used only in the presence of an actual obstruction of justice. In *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552 (1994), this Court noted that the contempt power "uniquely is 'liable to abuse,' " in that "[c]ontumacy 'often strikes at the most vulnerable and human qualities of a judge's temperament,' and its fusion of legislative, executive, and judicial powers 'summons forth . . . the prospect of "the most tyrannical licentiousness." ' " *Id.* at 2559 (citations

omitted). On that basis, the Court held that summary proceedings are permissible only " 'to maintain order in the courtroom and the integrity of the trial process in the face of an "actual obstruction of justice." ' " *Id.* at 2560 (citations omitted). The *Bagwell* decision thus sets the stage for a review by this Court of the propriety of the summary procedure utilized by the trial court in this case.

Finally, this case is readily distinguishable from *Holloway* on its facts. In *Holloway*, there could be little doubt that the attorney held in summary contempt was actually obstructing justice at the time the contempt citation was issued. The attorney in *Holloway* was told unambiguously by the trial court that he could not use the contents of a particular document to cross-examine a witness without laying a proper foundation, and was specifically instructed as to how to proceed.[1] Then in the moments im-

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[1] The trial court in *Holloway* directed the attorney as follows: "if you want to present [the document] to him and ask him if he has ever seen this particular document before, and not its contents, but the document itself, I will permit you to do that. . . . If this man has never seen that document before—and that's why I told you you must ask him if he has seen that document, not just those paragraphs contained in it—then he can't testify to it." 995 F.2d at 1089-90. The court then told the witness: "He's asking you to look at it to determine whether or not you have ever seen that document before." The attorney nevertheless immediately asked the witness: "Do you know what that document is?" The court interjected: "No, no, no. First of all, we just determine if he's ever seen it before." The court then asked the witness: "Have you ever seen that document before now?" The witness answered: "No, ma'am." *Id.* at 1090-91. The attorney nonetheless pressed on, asking the witness: "Do you know what that document is?" The court again reiterated the ruling it had made in the preceding moments: "If he has never seen it before, we are not going to ask him if he knows what it is." This still did not stop the attorney in *Holloway*. He asked the witness: "Having looked at it now, can you now tell us what it is, what that document is?" The trial court then advised the attorney: "this is the last time I'm going to tell you the objection is sustained." Undeterred, the attorney asked the witness: "Do you recognize any of the wording set forth in that document?" He was promptly held in contempt. *Id.* at 1091.

mediately preceding the contempt conviction in *Holloway*, the trial court directly and unambiguously ordered counsel several times not to ask the witness about the contents of that document. The attorney, in open defiance of the court, proceeded to ask the witness precisely the questions which the court had emphatically and repeatedly stated that he could not ask. The court then made clear to counsel that he had better not ask the same question yet again. Counsel immediately asked the same question again, and the court was left with no alternative but to hold the attorney in contempt. Thus, under the circumstances present in *Holloway*, the attorney's actual obstruction of justice was manifest.

In the present case, by contrast, Petitioner's statement which precipitated the contempt finding was in response to Judge Harris' observation that "[w]e have covered this several times, Mr. Levine." There was no admonition from the judge that Petitioner's interrogation was without foundation (as in *Holloway*); nor was there a series of misfired questions by Petitioner (as in *Holloway*). Instead, there was the spontaneous response to the trial court: "I want to get it straight, your Honor, because the witness is changing the testimony and I want to get it straight." No doubt, Judge Harris regarded the remark as argumentative, and thus, not an appropriate open-court statement. But it was not a retort by counsel spoken in defiance of the judge. Petitioner's spontaneous response sought only to explain to the judge in an abbreviated way why the question was asked. It was, moreover, just as promptly withdrawn, with Petitioner stating that he would move on (again, an apologetic attitude not present in *Holloway*). Nonetheless, Petitioner was summarily held in contempt, on the basis—according to the judge's written order filed 12 days later—that Petitioner's conduct during the days and weeks prior to the citation "cumulatively" amounted to contempt. This "cumulative" contempt citation—issued without a hearing as to a single incident that formed the basis of his conviction—thus presents a far more com-

pelling basis for review of whether a finding of an actual obstruction of justice is a necessary prerequisite to summary contempt.[2]

3. Respondent also attempts to demonstrate that, despite the court of appeals' clear statement that it would not determine whether Petitioner had actually obstructed justice because it believed (erroneously) that such an inquiry was unnecessary, the court of appeals somehow engaged in the very analysis it explicitly eschewed. This effort fails. As Respondent points out, the district court recognized that it was required to find an actual obstruction of justice in order to dispense with a hearing, and indeed made such a finding. That this finding was patently erroneous was a major contention of Petitioner on appeal. The court of appeals explicitly sidestepped this analysis in its opinion, incorrectly stating that the "obstruction-of-justice inquiry" was irrelevant because the court of appeals determined that Petitioner was convicted under 18 U.S.C. § 401(3) rather than § 401(1). Pet. App. 3a n.1. Although Respondent correctly notes that the court of appeals indicated considerable dissatisfaction with Petitioner's conduct, Respondent cannot avoid the fact that the only time the court of appeals refers to the "obstruction-of-justice inquiry" in its opinion is in the footnote in which it erroneously holds that such an inquiry is not necessary, despite the fact that the court dispensed with a hearing, held Petitioner summarily in contempt, and imprisoned him. It is clear that the court of appeals did not purport to engage in the obstruction of justice analysis required by this Court's rulings.

4. Respondent relies on *Ungar v. Sarafite*, 376 U.S. 575 (1964), for the proposition that, even if a trial judge

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[2] Moreover, the fact that Petitioner was not held in contempt at the time that any of these previous incidents occurred demonstrates that none of this prior conduct which formed much of the basis for the "cumulative" contempt finding amounted to an actual obstruction of justice.

feels that he has had his personal integrity and impartiality attacked by the alleged contemnor, there should be no presumption that he is "personally embroiled" so as to require that he refer the matter to another judge for a hearing on the contempt charges. This reliance is misplaced. In *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971), decided after *Ungar*, this Court ruled that a judge who has been attacked by an alleged contemnor is not "likely to maintain that calm detachment necessary for fair adjudication," and thus recusal is required based on a presumption that a judge who has been attacked will be, or appear to be, biased against the alleged contemnor —even if the judge has demonstrated not hostility but great patience in the face of such an attack. This Court reiterated and extended this principle in *Taylor v. Hayes*, 418 U.S. 488 (1974), holding that, even where the judge has not been attacked, the judge is disqualified from ruling on the contempt when he is so embroiled in a controversy with the alleged contemnor that he cannot " 'hold the balance nice, clear and true between the State and the accused.' " *Id.* at 501 (citation omitted). " 'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less." *Id.* (citation omitted). In *Taylor*, the Court distinguished *Ungar* on the grounds that "we were impressed [in *Ungar*] with the fact that the judge 'did not purport to proceed summarily during or at the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding.' " *Id.* at 503 (quoting *Ungar*, 376 U.S. at 588).[3] In the present case, unlike

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[3] Likewise, in *Nakell v. Attorney General of North Carolina*, 15 F.3d 319 (4th Cir.), *cert. denied*, 115 S. Ct. 184 (1994), on which Respondent also relies, the attorney whose conduct was at issue was given a hearing on the contempt charges against him, at which he was represented by counsel, permitted to call and question witnesses,

Ungar, no hearing was held before Petitioner was convicted of criminal contempt.

5. Finally, Respondent argues that in the present case the conduct of Petitioner did not rise to the level of a personal attack. We agree that Petitioner's remarks would not be of the sort that a reasonable person would find offensive; nevertheless, the trial judge *did* find them offensive, and so much so that Petitioner's remarks regarding the correctness of the trial court's rulings formed much of the basis for holding Petitioner in criminal contempt. *See* Pet. App. 23a, 27a-28a, 38a-40a. What is important in determining the judge's personal embroilment is not the true nature of the remarks but their impact on the trial judge. In this case, the judge explicitly stated that he believed that Petitioner's remarks were an attack on his personal integrity and impartiality. *Id.* As the D.C. Circuit has itself ruled, in *United States v. Meyer*, 462 F.2d 827, 845 (D.C. Cir. 1972), recusal is ordinarily required when there is "an impugnation of the integrity and impartiality of the trial judge," because such remarks constitute "personal attacks" within the meaning of *Mayberry* and its progeny. Under such circumstances, the court of appeals held, it is "unlikely that the trial judge is a competent factfinder with respect to the alleged contempt." *Id.* at 840. Here, the trial judge's statement that he believed Petitioner attacked him in this manner is conclusive proof that he ought to have referred the matter to another judge for a hearing.

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and allowed to personally take the stand to explain his conduct. *Id.* at 325.

CONCLUSION

For the foregoing reasons as well as those stated in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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